Supreme Court, U.S.
FILED
NOV 15 1999

(2)

No. 99-448

In The

Supreme Court of the United States

ENSCO OFFSHORE COMPANY,

Petitioner,

v.

JODY C. SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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3287

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a seaman who sues under the Jones Act and general maritime law and who makes no claims at law and no jury demand has stated his case in admiralty?

2. Whether a seaman in such a case has an exclusive right to trial by the court?

3. Whether a seaman's employer in such a case may, by alleging diversity jurisdiction, nonetheless convert the seaman's action to one at law, demand a jury trial, and thus deprive the seaman of his election to trial by the court?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE CASE 1

II. REASONS FOR DENYING THE WRIT 4

III. CONCLUSION 10

APPENDICES

Appendix 1

United States District Court Civil Cover Sheet 1a

Appendix 2

United States District Court Scheduling Order Dated October 7, 1997 ..... 5a

Appendix 3

Letter of November 7, 1997, Respondent to Petitioner 9a

Appendix 4

Letter of November 17, 1999, Respondent to Petitioner 13a

Appendix 5

Respondent's Motion To Strike Jury Demand 15a

Appendix 6

Text of Jones Act, 46 U.S.C. 688 ..... 17a

TABLE OF AUTHORITIES

Page

CASES:

Concordia Company, Inc. v. Panek, 115 F.3d 67 (1st Cir. 1997) 6

Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) 8

Fitzgerald v. United States Lines, 374 U.S. 16 (1963) 8

Lewis v. United States, 812 F.Supp. 620 (E.D. Va. 1993) 6

Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992) 8

Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928) 6

Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830) 5

Panama R. Co. v. Johnson, 264 U.S. 375 (1924) 5, 6, 7

Panama R. Co. v. Vasquez, 271 U.S. 557 (1926) 6

Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986) 8

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 5, 8

Ross v. Bernhard, 396 U.S. 531 (1970) 5

The Arizona v. Anelich, 298 U.S. 110 (1936) 8

Waring v. Clarke, 46 U.S. (5 How.) 441 (1847) 5

STATUTES:

Fed. R. Civ. P. 9(h) 9

Fed. R. Civ. P. 38(e) 5

TABLE OF AUTHORITIES – Continued

Page

Judiciary Act of 1789, § 9(d) 5

46 U.S.C. 688 ..... 1, 4, 5

TREATISES AND LEGAL PERIODICALS:

Billy Joe Dyer, Note, *The Jury on the Quarterback: The Effect of Pleading Jurisdiction When a Proceeding Turns Hybrid*, 63 Tex. L. Rev. 533 (1984) 9

C. Gilmore & C. Black, *The Law of Admiralty*, § 1-1 (2d ed. 1975) 5

Barbara Bennett Woodhouse, Comment, *Powell v. Offshore Navigation, Inc.: Jurisdiction Over Admiralty Claims and the Right to Trial by Jury*, 82 Colum. L. Rev. 784 (1982) 6

Charles Alan Wright, *Law of Federal Courts*, § 69 (5th ed. 1994) 7

I. COUNTERSTATEMENT OF THE CASE

Respondent, Jody C. Smith, a seaman employed by petitioner, Ensco Offshore Companv, filed suit against Ensco on June 30, 1997 in the United States District Court for the Western Division of Louisiana, Lafayette Division. He based his jurisdictional claims on the Jones Act, 46 U.S.C. 688, and the general maritime law and made no demand for jury trial.

1. In his original complaint, respondent, made these allegations as to jurisdiction:

> Jurisdiction
>
> III.
>
> This case is brought under 46 U.S.C. 688, commonly called the Jones Act, and the general maritime law and this Court has jurisdiciton over this case by virtue of both.

(Petitioner's Appendix J at 24a-27a).

2. Not only did respondent make no demand for jury trial in his complaint, at the time of filing as required by the Clerk's office, he also completed a Civil Cover Sheet. In it, respondent identified the Jones Act and general maritime law as the jurisdictional bases for his complaint, made no jury demand, and specifically declined to assert diversity as a basis of jurisdiction (Respondent's Appendix 1 at 1a-4a).

3. In its answer, petitioner, Ensco, alleged diversity of citizenship as an additional jurisdictional basis, asserted that the requisite jurisdictional amount was at issue, and asked for a jury trial (Petitioner's Appendix at 34a).

4. Under the case management procedures in place in the Western District of Louisiana, the parties were obliged to prepare and sign a Joint Status Report by November 17, 1997 (Respondent's Appendix 2 at 5a-8a). Such a report was completed by the parties and filed of record on November 19, 1997.

5. Under the case management procedures, it was the respondent's burden to initiate a meeting for discussion of the Joint Status Report and also his burden, thereafter, to actually prepare and file the report. Counsel for respondent, therefore, initiated such a conference with Ensco's lawyer, and following the conference prepared a suggested Report. By letter dated November 7, 1997, the suggested Joint Status Report was served on Ensco's lawyer (Respondent's Appendix 3 at 9a-12a).

Part 13 of the Joint Status Report required the parties to address bench or jury trial. As drawn by respondent's counsel and as provided to petitioner's counsel on November 7, 1997, Part 13 read:

> **"13. Bench/Jury Trial**
>
> **This case is currently scheduled as a jury trial."**

6. Although requested from petitioner's lawyer (Respondent's Appendix 3 at 9a), Ensco's portion of the Joint Status Report did not come back from its lawyer in time for respondent to meet the filing deadline of November 17, 1997. When, by that time the Report had not been returned by petitioner's lawyer, respondent's counsel obtained an extension and renewed his efforts to get the submission from petitioner's lawyer. Ultimately,

due to the press of time, the Joint Status Report was completed and filed on November 19, 1997, by petitioner's lawyer whose office is in Lafayette, Louisiana, only a half block from the courthouse. Counsel for Smith's office is in Baton Rouge, Louisiana, 60 miles from the courthouse.

7. Using the advantage gained by the circumstances described at Paragraphs 5 and 6, when the Joint Status Report was finally provided for respondent's counsel's approval, petitioner tried to force a stipulation on the bench/jury trial issue. As prepared by petitioner's counsel, Ensco's Part 13 of the Joint Status Report read:

"This will be a jury trial."

8. This provoked an objection by Jody Smith; his counsel wrote petitioner's lawyer on November 17, 1997, suggesting (a) that Part 13 was not accurate and (b) that Part 13 should be amended to show that the plaintiff reserved the right to elect trial to the bench (Respondent's Appendix 4 at 13a-14a).

9. Petitioner, Ensco, declined to put the language at Part 13 and instead put it at Part 17 of the Joint Status Report under "Additional Matters" (Petitioner's Appendix M at 44a).

10. Thereafter, respondent, Jody Smith, amended his complaint to clarify that his case was to be bench tried and to make clear that his case was one within the meaning of Rule 9(h) (Petitioner's Appendix K at 28a-29a). Petitioner Ensco then moved to dismiss the amended complaint (Petitioner's Appendix N at 45a-46a). Jody

Smith responded by filing a motion to strike Ensco's jury demand (Respondent's Appendix 5 at 15a-16a). Ultimately, the district court granted Ensco's motion, overruled Jody Smith's motion to strike, and the case proceeded to unsuccessful jury trial.

11. Respondent timely appealed to the U.S. Court of Appeals for the Fifth Circuit urging that he was entitled to a new trial, this one to the bench. That position was sustained by the Court of Appeals on the bases (i) that the right to a jury trial belonged only to plaintiff-Smith under the Jones Act and not to the employer, Ensco, (ii) that Smith's original complaint established admiralty and maritime jurisdiction and requested no jury trial, (iii) that, in any event, the clarifying amended complaint ought not to have been dismissed, and (iv) that Smith's election, therefore, controlled.

II. REASONS FOR DENYING THE WRIT

This straightforward seaman's case, involving only a seaman and his employer, was brought in admiralty. While the Jones Act, 46 U.S.C. 688, allows a seaman to bring his claim at law and to demand a jury trial in such a "law-brought" case, respondent neither brought his case at law nor demanded a jury. The Court of Appeals correctly held that, as an admiralty and maritime case, petitioner had no right to jury trial inasmuch as, under doctrine long-settled in this Court, maritime cases are tried to the bench. There is, therefore, no need for this Court to reach petitioner's argument that a conflict (supposedly) exists among the circuits on the meaning of Rule 9(h). For these reasons, and the reasons further now set forth, the petition ought to be denied.

1. Admiralty and maritime cases are bench-tried matters and, except in circumstances not applicable here, give rise to no right of jury trial. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 369 (1959); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 447 (1830); *Ross v. Bernhard*, 396 U.S. 531, 533 (1970); Fed. R. Civ. P. 38(e); Judiciary Act of 1789, § 9(d).[1]

Respondent's case in the district court was based on the Jones Act, 46 U.S.C. 688, and the general maritime law. The terms "general maritime law", "admiralty", and "admiralty and maritime law" are virtually synonymous. G. Gilmore & C. Black, *The Law of Admiralty*, § 1-1 at 1 (2d ed. 1975).

2. No right to a jury trial arises under the Seventh Amendment in suits that invoke a federal court's admiralty jurisdiction. This is true because the Seventh Amendment only preserves a party's right to a jury trial as it existed at common law; there was no common law right to jury trial in admiralty cases. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). Therefore, petitioner, which appeared in the case only as defendant, could not change this admiralty case into a "law side" case by asserting for itself the existence of diversity and jurisdictional amount as another basis for jurisdiction.

3. The rights established by the Jones Act, 46 U.S.C. 688, are peculiarly and particularly maritime in nature and substance. *Panama R. Co. v. Johnson*, 264 U.S. 375 (1924). Seamen's claims which are brought under the

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[1] The relevant portion of the Judiciary Act of 1789, Section 9(d), appears in Petitioner's Appendix I, p. 23a.

Jones Act arise in the admiralty and not outside of it. *Panama R. Co. v. Johnson*, 264 U.S. at 386-389; *Panama R. Co. v. Vasquez*, 271 U.S. 557, 559-560 (1926); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 134-135 (1928). Therefore, when respondent asserted jurisdiction based on the Jones Act and demanded no jury trial, he was invoking the court's admiralty jurisdiction. *Panama R. Co. v. Johnson, supra.* See also *Concordia Company, Inc. v. Panek*, 115 F.3d 67, 72 (1st Cir. 1997); *Lewis v. United States*, 812 F.Supp. 620, 627 (E.D. Va. 1993).

Of course, under the Jones Act[2] a seaman has the right, at his election, to sue at law with right of trial by jury or in admiralty in which case his claim will be tried to the bench. Here respondent made no claims at law under the savings to suitors clause.[3] Instead, he based his claims solely and exclusively on the Jones Act and general maritime law and demanded no jury. Therefore, from the very outset, both bases of jurisdiction on which respondent relied were in the admiralty and in it alone.

Try as it might, petitioner can point to no place at which respondent put diversity jurisdiction at issue.[4] As

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[2] The statute is set out at Respondent's Appendix 6.

[3] See: Woodhouse, Comment, Powell v. Offshore Navigation, Inc.: *Jurisdiction Over Admiralty Claims and the Right to Trial by Jury*, 82 Colum. L. Rev. 784, 786, 787 (1982): "[The] saving clause has been interpreted as preserving the suitor's access to the common law courts, which had traditionally exercised concurrent jurisdiction over maritime cases. It allows a maritime plaintiff to bring his claim as an in personam tort or contract claim in state court or as a diversity rather than an admiralty claim in federal court."

[4] Petition, footnotes 13 and 23.

respondent's original complaint shows (Petitioner's Appendix J at 24a-27a), at no time did respondent urge diversity of the parties and the requisite jurisdictional amount as the jurisdictional basis for his claims. Respondent did identify both himself and the defendant in Paragraphs 1 and 2 of his original complaint under the subheading "Parties" (Petitioner's Appendix J at 24a).

Noticeably absent, however, anywhere in the original complaint is the claim that Ensco (the defendant) had its principal place of business in a state other than plaintiff's domicile and also noticeably absent is any claim of jurisdictional amount. These, together with naming a defendant's state of incorporation, are the standard means of establishing diversity jurisdiction.[5] Noticeably present, however, in petitioner's answer (Petitioner's Appendix L at 34a) is the claim that the parties were diverse and that the requisite jurisdictional amount existed. It follows that it was petitioner and not respondent which attempted to cast the matter on the "law side". Neither under the general maritime law nor under the Jones Act did petitioner have a right to transfer the case to the "law side" of the court. No jury trial was available to petitioner and the Court of Appeals correctly so held.

4. Although a seaman is entitled to a jury trial on his Jones Act claim, he need not demand one. *Panama R. Co. v. Johnson,* 264 U.S. 375, 390-391 (1924). The right under the Jones Act to request trial by jury is exclusively that of the plaintiff-seaman. If the seaman does not

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[5] Charles Alan Wright, *Law of Federal Courts,* § 69 at 478-79 (5th ed. 1994).

demand a jury trial, an employer-defendant such as petitioner is afforded no right to one by the Act. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1217 (5th Cir. 1986); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992). Therefore, petitioner by asserting diversity jurisdiction for itself, as it did, could not take away respondent's exclusive right under the Act as a seaman to elect bench or jury trial. Respondent elected bench trial at the outset and his election controls.

5. A maritime suitor, such as respondent, historically had the option of pursuing an admiralty case (with trial to the court) or a common law case in a state or federal forum (with right of trial to a jury). *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371 (1959). Inasmuch as the Jones Act is remedial and welfare legislation designed for the benefit and protection of seamen and is to be liberally construed to attain that end, *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936), the decisions of this Court have evidenced a clear willingness to extend a seaman's right to jury trial, when demanded, through the whole reach of available maritime remedies. *Romero, supra; Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). No cogent reason exists not to honor a seaman's election when he, instead, selects trial to the bench.

6. It is true, of course, that respondent's original complaint did not make a Rule 9(h) designation. It is true, also, of course, that respondent by amended complaint later made such a designation. However, the amended complaint was necessary only because petitioner tried to force a stipulation. In any event, it was surplusage and

unnecessary because respondent never invoked any but the maritime jurisdiction of the court. The Court of Appeals correctly so held.

The text of the Rule[6] suggests that a 9(h) designation "may" be necessary when a claim is also within the jurisdiction of the court on some other basis. However, under the Rule if the claim is cognizable only in admiralty, it is an admiralty and maritime matter whether the designation is made or not. Here both of these provisions support the proposition that no 9(h) designation was necessary: respondent pled none but admiralty jurisdiction, and, in any event, the whole of respondent's claims were distinctly and peculiarly admiralty and maritime claims.

Finally, as initially noted, this case raises only a straightforward seaman's suit against his employer. None of the issues involved in what have now been termed "hybrid"[7] admiralty cases are raised here. Petitioner was not a counterclaimant, no claims against multiple defendants – some maritime and some not maritime – were brought, and no party except the plaintiff/respondent had the right to cast the case as one in admiralty or one at law. Petitioner's contrived claim to diversity jurisdiction gave it no right to jury trial.

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[6] Fed. R. Civ. P. 9(h), Petitioner's Appendix G at 14a.

[7] See, generally, Billy Joe Dyer, Note, *The Jury on the Quarterdeck: The Effect of Pleading Jurisdiction When a Proceeding Turns Hybrid*, 63 Tex. L. Rev. 533 (1984).

III. CONCLUSION

Respondent was a seaman, a ward of the admiralty courts, and entitled to choose bench or jury trial. His right to choose was exclusive; petitioner by contriving "law side" jurisdiction, could not revoke that election. This case was an admiralty and maritime case from the beginning; the petition for certiorari should be denied.

Respectfully submitted,

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Baton Rouge, Louisiana 70810
Telephone (225) 768-9771
Fax: 225-769-9432
Attorneys for Respondent,
Jody C. Smith

APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. **(SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)**

I. (a) **PLAINTIFFS**

Jody C. Smith

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Lafayette (EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Charrier & Charrier
8110 Summa Avenue
Baton Rouge LA 70809

DEFENDANTS

Ensco Offshore Company
(formerly Energy Service Company, Inc.)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

ATTORNEYS (IF KNOWN)

II. **BASIS OF JURISDICTION**

(PLACE AN X IN ONE BOX ONLY)

[ ] 1 U.S. Government Plaintiff

[ ] 2 U.S. Government Defendant

[X] 3 Federal Question*
(U.S. Government Not a Party)

[ ] 4 Diversity
(Indicate Citizenship of Parties in Item III)

Jones Act, GML[1]

III. **CITIZENSHIP OF PRINCIPAL PARTIES**
(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For Diversity Cases Only)

	PTF	DEF
Citizen of This State	[ ] 1	[ ] 1
Citizen of Another State	[ ] 2	[ ] 2
Citizen or Subject of a Foreign Country	[ ] 3	[ ] 3
Incorporated *or* Principal Place of Business in This State	[ ] 4	[ ] 4
Incorporated *and* Principal Place of Business in Another State	[ ] 5	[ ] 5
Foreign Nation	[ ] 6	[ ] 6

---

[1] On the original Cover Scheet the asterisk and the words "Jones Act, GML" were typed on the form by respondent. "GML" is a reference to the general maritime law.

IV. **ORIGIN**

[X] 1 Original Proceeding

* * *

V. **NATURE OF SUIT**

(PLACE AN X IN ONE BOX ONLY)

CONTRACT

* * *

REAL PROPERTY

* * *

PERSONAL INJURY

* * *

[X] 340 Marine

* * *

CIVIL RIGHTS

* * *

PRISONER PETITIONS

* * *

FORFEITURE/PENALTY

* * *

LABOR

* * *

BANKRUPTCY

* * *

PROPERTY RIGHTS

* * *

SOCIAL SECURITY

* * *

FEDERAL TAX SUITS

* * *

OTHER STATUTES

* * *

VI. **CAUSE OF ACTION** (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY) 46 USCA 688, Plaintiff injured. Gulf of Mexico.

VII. **REQUESTED IN COMPLAINT**:

* * *

VIII. **RELATED CASE(S) IF ANY**

* * *

DATE 6/27/97

SIGNATURE OF ATTORNEY OF RECORD

/s/ John O. Charrier, Jr. 4097

* * *

APPENDIX 2

[Filed Oct. 4, 1997]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JODY C SMITH

CIVIL ACTION NO. 97-1302

VERSUS **JUDGE SHAW**

MAGISTRATE JUDGE METHVIN

ENSCO OFFSHORE CO.

SCHEDULING ORDER

The following dates are hereby set:[1]

TRIAL: Jury
May 26, 1998 at 9:30 A.M.
in Lafayette before Judge Shaw

PRETRIAL CONFERENCE:
May 7, 1998 at 10:00 A.M.
in Lafayette before Judge Shaw

In the event that the assigned trial and pretrial conference date(s) present an irreconcilable scheduling conflict or good cause otherwise exists, any counsel or unrepresented party may request that a conference be conducted (in person or by telephone) with the Magistrate Judge assigned to the cause and a conference will be scheduled.

---

[1] If a deadline falls on a Saturday, Sunday or federal holiday, the effective date is the first business day following the deadline imposed.

The request for a conference shall be conveyed to the Court in paragraph 2 of the Joint Status Report. (Attached)

DEADLINE:		FOR:
10/27/97[2]	1.	INITIAL DISCLOSURE REQUIREMENTS (EXCHANGE OF MAY CALL WITNESS LIST AND PRELIMINARY EXHIBIT LIST).
11/06/97	2.	JOINT MEETING OF PARTIES.
11/17/97	3.	JOINT STATUS REPORT SUBMITTED TO MAGISTRATE JUDGE'S OFFICE.

NOTE: COMPLIANCE WITH PARAGRAPHS 1, 2 AND 3, AND INSTRUCTIONS THERETO, IS REQUIRED, ONLY IN CONNECTION WITH THE FIRST SCHEDULING ORDER. REPETITIVE COMPLIANCE WITH PARAGRAPHS 1, 2 AND 3 IS NOT REQUIRED. ALL PARTIES MUST COMPLY WITH PARAGRAPH 1, AND INSTRUCTIONS, AT LEAST, ONCE. (SEE FOOTNOTE 2, PAGE 1 OF SCHEDULING ORDER.) PARTIES WHO MAKE THEIR FIRST APPEARANCE IN THIS ACTION AFTER THE DATE THE FIRST SCHEDULING ORDER IS ENTERED WILL NOT BE REQUIRED TO COMPLY

---

[2] Parties who make an appearance in this case subsequent to the initial disclosure deadline shall comply with the initial disclosure requirements within 20 days following the filing of the document which establishes their first appearance in the case and comply with all other deadlines as written.

WITH PARAGRAPHS 2 AND 3 AT ANY TIME DURING THIS LITIGATION.

* * *

INSTRUCTIONS

PARAGRAPH 1

DEADLINE: 10/27/97

(20 DAYS FOLLOWING FILING OF THIS ORDER)

* * *

PARAGRAPH 2

DEADLINE: 11/96/97

(20 DAYS FOLLOWING FILING OF THIS ORDER)

The parties shall meet jointly either in person or by telephone conference to discuss the nature and basis of their claims and defenses, make a good faith effort to negotiate an early settlement and to complete the Joint Status Report. Counsel **SHALL** advise their clients prior to the joint meeting of the meeting and obtain their clients' desires as to the value of pursuing early settlement negotiations and the possibility of extending an offer at the joint meeting.

All attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting and for delivering to the offices of the assigned Magistrate Judge, the Joint Status Report signed by all attorneys of record and all unrepresented parties who have appeared in the case.

PARAGRAPH 3

DEADLINE: 11/17/97
(40 DAYS FOLLOWING FILING OF THIS ORDER)

The ***ORIGINAL*** Joint Status Report signed by all attorneys of record and unrepresented parties who have appeared in the case shall be received in the offices of the assigned Magistrate Judge on or before the deadline. ***FAX COPIES WILL NOT BE ACCEPTED.*** The Joint Status Report shall address all matters outlined in the attached form Joint Status Report and shall follow the same format. *The report shall be mailed or delivered directly to the Magistrate Judge assigned to the case for review and approval.*

FAILURE TO SUBMIT THE JOINT STATUS REPORT AS REQUIRED

HEREINABOVE WILL INVITE IMPOSITION OF THE SANCTIONS AUTHORIZED BY F.R.CIV.P. 16(f).

* * *

Lafayette, Louisiana, this 7 day of October, 1997.

s/ Mildred E. Methvin
MILDRED E. METHVIN
UNITED STATES MAGISTRATE JUDGE

PREPARED
DATE: October 7, 1997
BY:

APPENDIX 3

November 7, 1997

Alan K. Breaud, Esq.
Breaud & Lemoine
P. O. Box 3448
Lafayette LA 70502

Re: Jody C. Smith vs
Ensco Offshore Services
Civil Action No. 97-1302
USDC Western District LA

Dear Mr. Breaud:

Here are:

1. My suggested "Joint Status Report"; and

2. Disk on which the Report appears (WordPerfect 5.1).

As agreed in our telephone conference yesterday, you will complete your sections and return the document to me for signing. I have taken several liberties with the form, chief among them style and the elimination of instructions to counsel. Due to your superior experience with conferences of this kind in the Western District, if you believe that my stylistic changes won't be well received, you may revert to the pure style suggested by the Court.

Please make any changes you wish and get the original back to me in adequate time so that I can get the matter filed inside the deadline.

Very truly yours,

/s/ John O Charrier, Jr.
John O. Charrier, Jr.

JOC,Jr/pbl
Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

JODY C. SMITH	CIVIL ACTION NO. CV97-1302
VERSUS	
ENSCO OFFSHORE COMPANY (FORMERLY ENERGY SERVICE COMPANY, INC.)	SECTION JUDGE SHAW
	MAGISTRATE JUDGE METHVIN

JOINT STATUS REPORT

A joint meeting of counsel was held on November 6, 1997 at 1:30 p.m. by telephone. The following counsel participated:

John O. Charrier Jr.
Charrier & Charrier
8923 Bluebonnet Blvd. Ste. 250
Baton Rouge LA 70810
Telephone: (504) 768-9771
COUNSEL FOR PLAINTIFF, Jody C. Smith

Alan K. Breaud
Breaud & Lemoine
P. O. Box 3448
Lafayette LA 70502
COUNSEL FOR DEFENDANT, Ensco Offshore Company

1. Witness and Document List Exchange

The parties have partially exchanged the required witness and document lists as ordered by the Scheduling Order. See § 2.

2. Necessity of Conference with Magistrate Judge

A. A conference with the Magistrate Judge is requested:

In Person X

By Phone _

B. These issues need to be addressed at such a conference:

- Incomplete initial witness list filed by defendant (no addresses of fact witnesses were included on defendant's list).
- Difficulty of meeting scheduled deadlines in light of discovery problems. See § 9 below.
-
-

THE PARTIES DISCUSSED THE FOLLOWING SUBJECTS

3. Jurisdiction

Jurisdiction in this case arises under 46 USCA 688, the so-called Jones Act, and the general maritime law.

* * *

13. **Bench/Jury Trial**

This case is currently scheduled as a jury trial.

* * *

17. Additional matters

None.

CERTIFICATION BY COUNSEL

I certify that the foregoing is accurate and complete.

_____

John O. Charrier Jr.

Baton Rouge, Louisiana this ___ day of _____ 1997.

_____

Alan K. Breaud

Lafayette, Louisiana this ___ day of _____ 1997.

_____

APPENDIX 4

FAX COVER SHEET

TO: Alan K. Breaud, Esq.

FROM: John O. Charrier Jr.

DATE: November 11, 1999

NUMBER OF PAGES FOLLOWING COVER SHEET: 0

TELECOPIER NO: 1-318-266-2204

MESSAGE

Re: Jody C. Smith vs Ensco

Dear Ms. Smith:[2]

I received the Joint Status Report. You are authorized to sign my name to the Joint Status Report. However, I point out two changes which should be made:

a. Section 7 does not accurately set forth my agreement to stipulate the authenticity of documents as Mr. Breaud was earlier notified.

b. Section 13 has been amended from what I suggested. Depending on the outcome of the discovery (see Section 6), plaintiff reserves the right to elect to convert the matter to an admiralty and maritime claim and, therefore, to elect trial to the bench. Please, therefore, amend Section 13 to reflect this.

---

[2] Paralegal to Alan K. Breaud

I have secured a 2-day extension. Please call me if you contemplate a problem with making these changes.

JOC,Jr.

APPENDIX 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

JODY C. SMITH	**CIVIL ACTION NO. CV97-1302**
VERSUS	**SECTION JUDGE SHAW**
ENSCO OFFSHORE COMPANY (FORMERLY ENERGY SERVICE COMPANY, INC.)	**MAGISTRATE JUDGE METHVIN**

MOTION TO STRIKE JURY DEMAND

COMES NOW plaintiff, Jody C. Smith, and moves to strike the demand for jury trial of defendant, Ensco Offshore Company (Ensco). Jody Smith supports his motion as follows:

1. Plaintiff, a seaman, sued Ensco under the so-called Jones Act, 46 U.S.C.A. 688, and the general maritime law. He made no demand for jury trial in his original complaint, and no other jurisdictional bases were alleged.

2. In time, Ensco answered, and among other things, asserted the applicability of diversity jurisdiction and made a jury demand. Thus Ensco, and not plaintiff, has sought to cast the matter as one scheduled for jury trial.

3. On January 7, 1998, plaintiff did amend his complaint; in it he clarified his election of a bench trial and he also designated the matter as one within Rule 9(h).

4. As a Jones Act seaman, plaintiff has the clear and exclusive right to elect a jury or a bench trial and also has the exclusive right to make the matter an admiralty and maritime claim within the meaning of Rule 9(h). Therefore, Ensco's demand for jury trial must be struck.

5. Additional factual and legal reasons supporting plaintiff's Motion To Strike are set forth in the attached Memorandum.

CHARRIER & CHARRIER

s/ John O. Charrier Jr.
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been served on all counsel of record, by Fax and U.S. Mail, this 10th day of February, 1998.

s/ John O. Charrier Jr.

APPENDIX 6

46 U.S.C. 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b)

* * *

(Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007)